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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CLAUDIO LORENZO VALDOVINOS, Defendant and Appellant.	H037095 (Santa Clara County Super. Ct. No. C1074501)

I. INTRODUCTION

Defendant Claudio Lorenzo Valdovinos pleaded no contest to two felony offenses, possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and removing or taking an officer's weapon other than a firearm (Pen. Code, § 148, subd. (b)),[1] and misdemeanor resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1)). He admitted the allegations that he had one prior violent or serious felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b) – (i), 1170.12) and had served a prison prior term (§ 667.5, subd. (b)). The trial court sentenced defendant to a total term of four years in the state prison.

On appeal, defendant contends that the trial court erred in (1) denying his motion to suppress evidence under section 1538.5; (2) failing to stay the sentence on the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

misdemeanor conviction pursuant to section 654; and (3) failing to award conduct credit under the version of section 4019 operative on October 1, 2011.

For reasons that we will explain, we find no merit in defendant's contentions and we will therefore affirm the judgment.

II. FACTUAL BACKGROUND

Our summary of the facts is taken from the reporter's transcript of the hearing on the motion to suppress evidence, which was held on February 1, 2011.

Police Officers Francisco Vallejo and Matthew Williams are members of the San Jose Police Department's Metro Unit, which focuses on gang suppression and street-level narcotics. On April 18, 2010, at about 10:50 p.m. the officers were patrolling an area near Lancelot Lane and Vernice Drive in San Jose, which they knew was an area with "high drug and gang activity." In particular, Officer Williams mentioned to Officer Vallejo that the residence located at 1195 Lancelot Lane "was related to gang and drug activity." Officer Williams had made an arrest at that address in 2009 after seeing a baggie of methamphetamine at the residence.

As Officer Vallejo and Officer Williams were patrolling in an unmarked police vehicle while wearing police uniforms, they observed a group of people standing in front of the residence at 1195 Lancelot Lane. They then saw two people separate themselves from the group and enter a car that was parked on the street. The police officers drove past 1195 Lancelot Lane very slowly, enabling them to see that defendant and another person were sitting in the car with the dome light on for a long time while manipulating something in their hands.

Officer Vallejo knew from his training and experience that "people who deal drugs often deal in their vehicles instead of their residences." Suspecting that the people in the car were conducting a drug transaction, Officer Vallejo and Officer Williams made a U-turn and parked about three feet behind the car. Both officers then got out of their car and approached the suspect vehicle. Officer Vallejo approached the passenger side,

while Officer Williams approached the driver's side. As he did so, Officer Williams had a clear view of the passenger side of the car. He saw defendant, who had tattoos indicating that he was a gang member, immediately reach down towards the floorboard of the car. For safety reasons, Officer Williams said to him, " 'Let me see your hands.' "

Defendant did not comply with Officer Williams' request to show his hands. When Officer Vallejo was about two or three feet away from the passenger door, defendant opened the door, jumped out, and charged towards him. Officer Vallejo could see that defendant "was reaching towards his pockets and waistband." As defendant "drove all his weight" into Officer Vallejo, he was able to brace himself and "get a hold" of defendant. The two of them then fell to the ground and struggled. Defendant managed to get out of Officer Vallejo's grip and tried to run away.

As defendant attempted to flee, Officer Vallejo was able to grab defendant's shirt and trip him to the ground. Officer Williams assisted Officer Vallejo by trying to hold defendant down while Officer Vallejo repeatedly told defendant to " 'Calm down.' " Defendant "refused to obey" the officers and again managed to get up off the ground.

At that point, Officer Williams pulled out his baton and "proceeded to baton" defendant, but "[i]t didn't work." Although Officer Williams struck defendant with the baton several times in the arm and shoulder areas, it appeared to have no effect on him. Defendant was able to grab the baton from Officer Williams, but he dropped it and ran away after Officer Williams brought up his hand gun. Defendant ran about "a car's length" before Officer Vallejo caught up to him and tripped him again. As defendant "[tried] to struggle" out of the officers' grips, Officer Williams pulled out his taser and tased defendant three times. Defendant got to his feet and attempted to run away after being tased the first and second times. Officer Williams held the taser down longer the third time and called to Officer Vallejo to handcuff defendant. Defendant did not submit to any of the officers' demands until he was handcuffed.

After handcuffing defendant, Officer Vallejo looked for evidence by tracing the path that defendant took during his struggle with the police officers. The path was about three to four car lengths long and went from the passenger side of the suspect vehicle to the point where defendant was on the ground after being tased and handcuffed. About two to three feet from where defendant was lying on the ground, Officer Vallejo found a "round plastic baggie containing a white crystal-like substance," which he recognized from his training and experience to be methamphetamine.

III. PROCEDURAL BACKGROUND

The complaint filed on April 22, 2010, charged defendant with two felony offenses, possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and removing or taking an officer's weapon other than a firearm (§ 148, subd. (b); count 2), and misdemeanor resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1); count 3). The complaint also alleged that defendant had been convicted of one prior violent or serious felony within the meaning of the Three Strikes law (§§ 667, subds. (b) – (i), 1170.12) and had served a prison prior term (§ 667.5, subd. (b)).

After the preliminary hearing held on September 8, 2010, defendant was held to answer on all charges. The information filed on September 16, 2010, included the same charges and special allegations as the complaint.

On January 14, 2011, defendant filed a motion to suppress evidence pursuant to section 1538.5. He argued that all of the evidence used to charge him on counts 1, 2 and 3 should be suppressed because the evidence had been discovered as the result of an illegal detention. According to defendant, he was detained when Officer Williams ordered him to show his hands and Officer Vallejo "blocked [defendant's] only exit from the car." The detention was illegal, defendant argued, because the police officers' observations that defendant was walking in a high crime area and handling an unidentified object in a parked car were insufficient for a reasonable suspicion that

defendant was involved in criminal activity absent any connection to 1195 Lancelot Lane.

The People opposed the motion to suppress, contending that defendant was not detained until he submitted to the police officers' show of authority, which occurred when he was tased and handcuffed. Alternatively, the People argued that even if the police officers' initial contact with defendant constituted a detention, a brief investigatory detention was justified due to the following: The officers' knowledge of gang activity in the area; their knowledge of past narcotic activity at 1195 Lancelot Lane; the separation of the group of people in front of the residence upon the appearance of the officers' unmarked police car; defendant was sitting in a car with the dome light on with another person on for more than a minute; all of this was occurring at a dark location at nighttime; and defendant's reaction to the officers. Finally, the People argued that the issue of the lawfulness of the police officers' conduct should be submitted to the jury.

At the hearing on the motion to suppress held on February 1, 2011, the trial court denied the motion. The court found that defendant had not submitted to the authority of law enforcement until he was handcuffed, based on the evidence showing that defendant did not obey the initial command to show his hands, got out of the car and ran away, got up after an officer had taken him down and applied physical force, grabbed one officer's baton, dropped it, and then ran away after the officer showed his gun. Relying on the decision in *California v. Hodari D.* (1991) 499 U.S. 621 (*Hodari D.*), the court stated, "It doesn't sound to me like he was physically restrained until they finally tackled him and cuffed him. And he certainly didn't submit to authority."

After the motion to suppress was denied, defendant entered into a plea agreement in which he pleaded no contest to all counts and admitted the allegations that he had one prior violent or serious felony conviction within the meaning of the Three Strikes law (§§ 667, subds. (b) – (i), 1170.12) and had served a prison prior term (§ 667.5, subd. (b)) in exchange for a sentence of not more than four years in the state prison.

During the sentencing hearing held on June 23, 2011, the trial court heard and denied defendant's motion pursuant to *People v. Superior Court* (*Romero)* (1996) 13 Cal.4th 497. The court then imposed a total term of four years, consisting of 32 months on count 1 (possession of methamphetamine; Health & Saf. Code, § 11377, subd. (a)) and 16 months on count 2 (removing or taking an officer's weapon other than a firearm; § 148, subd. (b)). The court struck the prior prison term in the interests of justice under section 1385 and imposed a concurrent 30-day county jail term on count 3 (resisting, delaying, or obstructing an officer; § 148, subd. (a)(1)), with 30 days credit for time served. The court awarded defendant 137 days of credit for time served and 68 days of presentence conduct credit.

Defendant subsequently filed a timely notice of appeal based on the denial of his motion to suppress evidence and matters occurring after the entry of his no contest plea.

IV. DISCUSSION

A. *Motion to Suppress Evidence*

On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence under section 1538.5 because his detention was illegal, and therefore all of the police officers' observations after his detention must be suppressed as the fruits of the illegal detention. According to defendant, he was seized within the meaning of the Fourth Amendment when he exited the car and " 'drove his weight' " into Officer Vallejo, who then "grabbed [him], tripped him, and the two of them fell to the ground." Defendant also claims that Officer Williams "further immobilized" defendant by striking him with his baton.

Defendant argues that the police officers did not have reasonable suspicion to detain him based on their observations that he was sitting in a car in a high crime area where one of the officers had previously arrested another person for methamphetamine possession. Alternatively, defendant claims that the police officers illegally detained

defendant when they "blocked" defendant's vehicle with their vehicle and ordered him to show his hands.

With regard to his attempts to flee from the police officers, defendant asserts that "he was exercising his right to avoid an unwanted encounter with the police after they had taken concrete and articulable steps to detain him." Defendant also argues that his use of force against Officer Vallejo was "legally privileged" because a person who is being illegally detained "may oppose the officer with reasonable force."

The People reject defendant's contentions and maintain that defendant was not detained when he was initially contacted by the police officers, since it is well established that an officer may approach the occupants of a car to ascertain their well-being without an individualized suspicion that they are involved in criminal activity. The People also argue that defendant was not detained because he did not submit to the officer's show of authority.

Alternatively, the People assert that the circumstances justified detention, including the gang activity in the area, the narcotics activity at 1195 Lancelot Lane, the time of day, defendant's presence in a car with another person with the interior light on for more than a minute, the movement of defendant's hands toward the car's floorboards, and defendant's attempt to flee when the officers approached.

The People also argue that detention was justified because defendant committed battery upon an officer (§§ 242, 243, subd. (b)) when he "hurled himself" at Officer Vallejo. Defendant did not have a right to use force to resist the officer, according to the People, because Officer Vallejo did not use or threaten to use excessive force.

Under the applicable standard of review, we determine that the trial court did not err in denying defendant's motion to suppress evidence. " 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence.' " (*People v. Redd* (2010) 48 Cal.4th 691, 719.) "If there is conflicting

testimony, we must accept the trial court's resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them. [Citations.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.) " 'In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citations.]" (*People v. Redd*, *supra*, at p. 719, fn. omitted.)

In the present case, the trial court made the following findings: (1) defendant did not comply with Officer Williams' request to show his hands; (2) defendant got out of the car and ran away; (3) after Officer Vallejo took defendant down, defendant got up; (4) defendant was batoned and took the officer's baton; (5) the officer drew his gun; (6) defendant dropped the baton, kept running and was tased; and (7) defendant was not physically restrained until "they finally tackled him and cuffed him." Based on these factual findings, the court determined that defendant had not submitted to authority and was not detained until the police officers succeeded in physically restraining him. Noting that the *Hodari D.* decision "tell[s] us that a detention is physical force that's successful or submission to authority," the court denied the motion to suppress evidence.

The trial court properly relied on the decision in *Hodari D.* in ruling on defendant's motion to suppress evidence. The United States Supreme Court has instructed that "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, ' "by means of physical force or show of authority," ' terminates or restrains his [or her] freedom of movement, [citation]. . . ." (*Brendlin v. California* (2007) 551 U.S. 249, 254 (*Brendlin*).) Citing its earlier decision in *Hodari D.*, the Supreme Court further instructed that "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. See [citations]." (*Ibid.*)

In *Hodari D.*, the issue was whether the juvenile, Hodari D., was seized within the meaning of the Fourth Amendment. (*Hodari D., supra*, 499 U.S. at p. 623.) Hodari D. was in a group of four or five youths huddled around a car in a high-crime area of Oakland when police officers approached the group in an unmarked car. The youths apparently panicked, fled, and were chased by the officers. Hodari D. did not see an officer until the "officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, [the officer] tackled Hodari, handcuffed him, and radioed for assistance." (*Ibid*.)

The Supreme Court stated in *Hodari D.* that "[t]he narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not." (*Hodari D., supra*, 499 U.S. at p. 626.) The court explained that "assuming that [the officer's] pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." (*Id*. at p. 629.)

Further clarifying the test for a seizure within the meaning of the Fourth Amendment, the Supreme Court stated in *Brendlin* that "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." (*Brendlin, supra*, 551 U.S. at p. 262.)

Having reviewed the record in this matter, we determine that substantial evidence supports the trial court's finding that defendant did not submit to the police officers' show of authority at any time. The police officers testified that defendant failed to comply with Officer Williams' command to show his hands, continually attempted to flee from the police officers, and resisted their efforts to physically restrain him until Officer Williams tased him for a third time and Officer Vallejo was able to handcuff him.

We also determine that substantial evidence supports the trial court's finding that defendant was not seized within the meaning of the Fourth Amendment until he was tased for the third time and handcuffed. It was not until that point that the police officers succeeded in their attempts to seize defendant, a fleeing suspect, by physically overpowering him. (*Brendlin, supra,* 551 U.S. at p. 262.)

We are not convinced by defendant's argument that the police officers could not lawfully detain him due to his use of force against Officer Vallejo. Defendant asserts that his use of force was privileged under the ruling in *People v. Jones* (1970) 8 Cal.App.3d 710, 717 (*Jones*), that "an officer engaged in an unlawful detention for questioning may be resisted by means of reasonable force. [Citation.]" Defendant acknowledges that section 834a[2] provides a person has a duty to refrain from using force to resist an arrest, but contends that the *Jones* court properly determined that section 834a does not apply to a detention. Defendant also acknowledges that the ruling in *Jones* was rejected in *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 329-333 (*Evans*), which concerned a civil action arising from the plaintiff's claim that he was injured during a police detention. The *Evans* court stated, "execution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense. [Citations.]" (*Id.* at p. 331.) Defendant argues that *Evans* was wrongly decided.

Defendant has not brought to our attention any published decision citing *Jones* for the proposition that an officer "engaged in an unlawful detention for questioning may be resisted by means of reasonable force." (*Jones, supra,* 8 Cal.App.3d at p. 717.) Moreover, as the *Evans* court stated, "If the ultimate determination of the lawfulness of the detention is a troublesome question for trained legal minds, should there be a rule of

[2] Section 834a provides: "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

law allowing spur-of-the moment physical force triggered by the detainee's lay perception of the detention's legal justification? The mere positing of the question provides the answer. No." (*Evans, supra,* 22 Cal.App.4th at p. 332-333.)

In any event, the *Jones* decision has no application here because the police officers were not able to engage defendant in a detention for questioning upon their initial contact with him at the suspect car, since he managed to escape Officer Vallejo's grip and flee. As we have discussed, defendant was not detained or seized within the meaning of the Fourth Amendment until the police officers succeeded in physically overpowering him by means of taser and handcuffs. By then, the police officers had probable cause to arrest defendant for the offense of removing or taking Officer Williams' baton (§ 148, subd. (b)). (*People v. Celis* (2004) 33 Cal.4th 667, 673 [probable cause exists when the facts known to the arresting officer would persuade a reasonable person that the arrestee has committed a crime].) Defendant has therefore failed to show that he was detained in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures.

For these reasons, we conclude that the trial court did not err in denying defendant's motion to suppress evidence.

B. *Sentencing Error*

Defendant contends that the trial court erred in failing to stay execution of the 30-day county jail sentence[3] on the misdemeanor conviction for resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1); count 3) pursuant to section 654's ban on multiple punishments for offenses committed with a single criminal objective. According to defendant, when he "used force against Officer Vallejo, [he] had only a single criminal intent; namely, he was intending to escape. Thus, he cannot be punished for both taking the baton ([§] 148, [subd.] (b)) and resisting arrest ([§] 148, [subd.] (a)(1))."

[3] The record reflects that with respect to the 30-day jail sentence on count 3, defendant received a credit of 30 days for time served.

The People disagree. They argue that the sentence on the misdemeanor conviction was proper under the exception for crimes of violence against multiple victims to section 654's ban on multiple punishment, because defendant "assaulted" two police officers. Defendant responds that the multiple victim exception does not apply because the section 148, subdivision (a)(1) offense of resisting arrest can be committed without the use of violence.

At the outset, we note that defendant did not object to the sentence on count 3 at the time of sentencing. However, a defendant's claim of sentencing error under section 654 generally "is not waived by failing to object below." (*People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*).) We will therefore address the merits of defendant's claim.

Section 654 provides in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Thus, "[s]ection 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*Hester*, *supra*, 22 Cal.4th at p. 294.) Under section 654, "the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

The California Supreme Court has further instructed that determining "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (June 21, 2012, S163273) __ Cal.4th __.)

The applicable standard of review is well established. "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Where, as here, the trial court did not refer to section 654 during sentencing, "the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. [Citations.]" (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626-627.) The court's implicit factual determination that the crimes involved more than one objective must be sustained on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

We find that substantial evidence supports the trial court's implicit determination that defendant's crimes of removing or taking Officer William's baton (§ 148, subd. (b); count 2) and resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1); count 3) had separate objectives. According to the police officers' testimony, when defendant got out of the suspect car upon the police officer's initial contact, he "drove all his weight" into Officer Vallejo and the two fell to the ground in the ensuing struggle. Another struggle occurred when defendant got up and attempted to flee, but Officer Vallejo grabbed defendant's shirt and tripped him to the ground. Officer Williams assisted Officer Vallejo by trying to hold defendant down, but defendant again managed to get up and attempt to flee. The officers could not prevent defendant's flight until Officer Williams tased him three times and Officer Vallejo handcuffed him. Thus, the evidence shows that defendant's objective in violating section 148, subdivision (a)(1) by resisting, delaying, or obstructing arrest was an attempt to avoid arrest by the police officers. (See,

e.g., *People v. Hairston* (2009) 174 Cal.App.4th 231, 239-240 [defendant's objective in violating section 148, subdivision (a)(1) was to resist arrest].)

Officer Williams attempted to stop defendant's flight by pulling out his baton and striking defendant several times in the arm and shoulder areas, but he did not succeed in subduing defendant. Instead, defendant grabbed the baton from Officer Williams and only dropped it when Officer Williams displayed his hand gun. It may be reasonably inferred from this evidence that defendant's separate objective in violating section 148, subdivision (b) by grabbing Officer Williams' baton was to use the baton as a weapon and strike the officers who were pursuing him.

Since substantial evidence supports the trial court's implicit finding that each of defendant's crimes had a separate objective, we determine that the trial court did not err under section 654 by imposing a concurrent sentence on the misdemeanor conviction for violating section 148, subdivision (a)(1).

C. *Conduct Credit*

The trial court awarded defendant 68 days of presentence conduct credit. In his supplemental opening brief, defendant contends that he is entitled to 136 days of presentence conduct credit under the versions of section 4019 and section 2933 that became effective on October 1, 2011.

The People argue that the trial court correctly determined that defendant was entitled to 68 days of conduct credit under the versions of section 4019 and section 2933 that were in effect at the time of defendant's sentencing in June 2011.

Section 4019 authorizes presentence credits for worktime and for good behavior. (§ 4019, subds. (b) & (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939 (*Dieck*); *People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) These credits are collectively referred to as "[c]onduct credit." (*Dieck*, *supra*, at p. 939, fn. 3.) Subdivision (a) of section 4019 sets

forth the types of confinement or commitment for which a defendant may receive conduct credit under section 4019.[4]

To determine how much conduct credit the trial court should have awarded defendant, we first examine the amendments to section 4019.

1. The January 25, 2010 version of section 4019

Defendant committed the instant offenses in April 2010. He entered no contest pleas in February 2011 and was sentenced in June 2011. As we will explain, the calculation of defendant's presentence conduct credit is governed by the version of section 4019 effective January 25, 2010, and under this version, defendant is entitled to 68 days of conduct credit.

At the time defendant committed the instant offenses in April 2010, the version of section 4019 in effect was the January 25, 2010 version. Effective January 25, 2010, section 4019 was amended to allow defendants to accrue custody credits at the rate of

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[4] Subdivision (a) of section 4019 states: "The provisions of this section shall apply in all of the following cases: [¶] (1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment, or a fine and imprisonment until the fine is paid in a criminal action or proceeding. [¶] (2) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence, in a criminal action or proceeding. [¶] (3) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp for a definite period of time for contempt pursuant to a proceeding, other than a criminal action or proceeding. [¶] (4) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp following arrest and prior to the imposition of sentence for a felony conviction. [¶] (5) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as part of custodial sanction imposed following a violation of postrelease community supervision or parole. [¶] (6) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170."

four days for every four days actually served, except for those defendants who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those, like defendant in the present case, with a prior conviction for a violent or serious felony. (Stats. 2009, 3d Ex.Sess. 2009-2010, ch. 28, § 50 [former § 4019, subds. (b), (c) & (f)].) For these persons, conduct credit under section 4019 accrued at the rate of two days for every four days of actual time served in presentence custody, despite the January 25, 2010 amendments. (Stats. 2009, *supra*, ch. 28, § 50 [former § 4019, subds. (b)(2) & (c)(2)].)

Effective September 28, 2010, section 4019 was again amended. The September 28, 2010 version provided that a defendant may earn conduct credit at a rate of two days for every four-day period of actual custody. (Stats. 2010, ch. 426, §§ 2 & 5.) In the same legislation, section 2933, which was previously applicable only to worktime credits earned while in state prison, was also amended. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].) As of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of presentence conduct credits for those defendants sentenced to a prison term, with certain exceptions. This amendment to section 2933 provided for one day of presentence conduct credit for one day of actual custody, but excluded those inmates required to register as sex offenders, those committed for a serious felony, and those, like defendant in the present case, with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of presentence conduct credits under section 4019, accruing at the rate of two days for every four-day period of actual custody. However, the September 28, 2010 version of section 4019 was expressly made applicable only to prisoners who committed a crime on or after September 28, 2010. (Former § 4019, subd. (g).)

In the present case, we determine that defendant, who was in actual presentence custody for 137 days, is thus entitled to 68 days conduct credit under the version of

section 4019 effective January 25, 2010. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26 [explaining that under a prior version of section 4019 providing for conduct credit at a rate of two days for every four-day period of actual presentence custody, conduct credit is calculated by taking the number of actual custody days, dividing it by four, discarding any remainder, and multiplying the result by two].)

2. The October 2011 version of section 4019

Defendant contends that principles of equal protection require that the version of section 4019 operative October 1, 2011, be applied to him and that, under this version, he is entitled to a total of 136 days conduct credit. We disagree.

Operative October 1, 2011, the current version of section 4019 eliminates the disqualification of defendants with prior serious felony convictions under section 2933 that was in place under the September 28, 2010 version, and generally provides that a defendant may earn conduct credit at a rate of *four* days for every four-day period of actual presentence custody. (§ 4019, subds. (b), (c) & (f).) Section 4019 expressly provides that this rate "shall apply prospectively" and that the rate applies to defendants who are confined in local custody "for a crime committed on or after October 1, 2011." (§ 4019, subd. (h).)

In this case, defendant committed his crimes and the trial court sentenced him *prior* to October 1, 2011. Defendant contends, however, that the equal protection clauses of the state and federal constitutions require that the October 2011 version of section 4019 be applied to him. He asserts that "[a] prison inmate who has previously received some conduct credit under former sections 2933 and 4019 is similarly, if not identically, situated to every prison inmate who will receive additional conduct credit under the new statutes." He further contends that a prospective-only application of the October 1, 2011 version of section 4019 violates equal protection, based on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 (*Carroll*), which was cited in *Kapperman*. He also relies on *People v. Sage*

(1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it held that felons were similarly situated to all other jail inmates and that the version of section 4019 effective then was violative of equal protection since it denied conduct credit to felons who were sentenced to prison.

To prevail on an equal protection claim, a defendant must first establish " 'that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*).) Further, in determining whether a statute violates equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837 (*Wilkinson*).) If, as in this case, the statutory distinction at issue does not "touch upon fundamental interests" and is not based on gender, no equal protection violation will be found "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*Hofsheier, supra*, at p. 1200; see *Wilkinson, supra*, at p. 838 [rational basis test applies where a defendant challenges a disparity in punishment for two battery offenses]; *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].)

Under the rational relationship test, " ' " 'a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' [Citations.]" (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201, italics omitted.)

In *Kapperman*, the California Supreme Court considered the constitutionality of an express prospective limitation in former section 2900.5, which limited custody credit "for time served in custody prior to the commencement of [a] prison sentence" to those defendants "delivered into the custody of the Director of Corrections on or after March 4, 1972, the effective date of the section." (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.)

The *Kapperman* court concluded that this limitation violated equal protection because the legislative classification—the date of commitment to state prison—was not reasonably related to a legitimate public purpose. (*Id.* at p. 545.)

We determine that *Kapperman* is not applicable in the present case, because the issue raised in *Kapperman* involved actual custody credit, not conduct credit. These two types of credit are distinguishable because custody credit is awarded automatically on the basis of time served (§ 2900.5), while conduct credit must be earned by a defendant (§ 4019). For the same reason, *Carroll*, *supra*, 35 Ill.2d 604, which addressed a statute granting prospective pretrial custody credit for actual time in custody prior to conviction, is not helpful to defendant in this case.

The decision in *Sage* is similarly unhelpful to defendant, because it involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants, but not felons. (*Sage*, *supra*, 26 Ca1.3d at p. 508.) The high court found that there was neither a "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Ibid.*) *Sage* is therefore distinguishable because the equal protection violation claim in that case was based on the defendant's status as a misdemeanant or felon. Moreover, *Sage* is not dispositive because it did not address an issue of retroactivity.

Importantly, the primary focus of the presentence conduct credit scheme set forth in section 4019 is the encouragement of " ' "minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed . . . ." ' [Citations.]" (*Dieck*, *supra*, 46 Cal.4th at p. 939.) Since a defendant who committed a crime and was sentenced prior to the operative date of an amendment to section 4019 cannot be retroactively encouraged to behave well during presentence custody, we find there is a rational basis for the Legislature's implicit intent that the amendment to section 4019 apply prospectively, and prospective application furthers the primary focus of section 4019. This remains true where, as here, the defendant has

already earned the maximum amount of presentence conduct credit available under a prior version of the statute and is only claiming entitlement to additional conduct credit for the same good behavior that allowed the defendant to earn the credit in the first place.

Therefore, we determine that defendant is not entitled to additional presentence conduct credit under the amendments to section 4019, operative October 1, 2011.

V. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

_____
MIHARA, J.

_____
DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.